No. 14-1470

In the Supreme Court of the United States

WILLIAM ROBERT BERNARD, JR.,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

On Writ of Certiorari to The Supreme Court of Minnesota

REPLY BRIEF FOR PETITIONER

JEFFREY S. SHERIDAN
Sheridan & Dulas, P.A.
320 Eagandale Center
1380 Corporate Center Curve
Eagan, MN 55121
(651) 686-8800

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
MICHAEL B. KIMBERLY
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

TABLE OF CONTENTS

Table of Authorities ii

A. Minnesota cannot justify its warrantless chemical breath tests under the search-incident-to-arrest doctrine. 1

1. *Robinson* does not state a special rule applicable to searches inside the body 1

2. Chemical BAC tests do not implicate the *Chimel* rationales. 4

B. Warrantless breath tests cannot be upheld on a theory of "general reasonableness." 6

Conclusion 11

TABLE OF AUTHORITIES

Arizona v. *Gant*,
556 U.S. 332 (2009) 2, 7

Bell v. *Wolfish*,
441 U.S. 520 (1979) 8

Chimel v. *California*,
395 U.S. 752 (1969) 2, 4, 6

Florence v. *Bd. of Chosen Freeholders of Cty. of Burlington*, 132 S. Ct. 1510 (2012) 4, 8

Illinois v. *Lafayette*,
462 U.S. 640 (1983) 4

Katz v. *United States*,
389 U.S. 347 (1967) 7

Knowles v. *Iowa*,
525 U.S. 113 (1998) 2

Maryland v. *King*,
133 S. Ct. 1958 (2013) 3, 8

Missouri v. *McNeely*,
133 S. Ct. 1552 (2013) ..... *passim*

People v. *Esayian*,
112 Cal. App. 4th 1031
(Cal. Ct. App. 2003) 9

Preston v. *United States*,
376 U.S. 364 (1968) 3

Riley v. *California*,
134 S. Ct. 2473 (2014) ..... *passim*

Schmerber v. *California*,
384 U.S. 757 (1966) 3-5

United States v. *Robinson*,
414 U.S. 218 (1973) 1-4

REPLY BRIEF FOR PETITIONER

In its brief, Minnesota offers two arguments: that a test of deep-lung air to determine blood alcohol concentration qualifies as a search incident to arrest within the meaning of that exception to the warrant requirement; and that, even absent *any* recognized warrant exception, such tests are "reasonable," and therefore permissible, as a general matter. These contentions fail even to attempt to respond to the contrary showings made in our opening *Bernard* and *Birchfield* briefs. They should be rejected by the Court.

A. Minnesota cannot justify its warrantless chemical breath tests under the search-incident-to-arrest doctrine.

1. Robinson *does not state a special rule applicable to searches inside the body.*

In defending the decision below that breath tests may be justified under the search-incident-to-arrest exception to the warrant requirement, Minnesota advances a single contention: that, under *United States* v. *Robinson*, 414 U.S. 218 (1973), warrantless tests of the person are per se constitutional. This assertion—which is not supported by the United States or North Dakota—is a double misreading of *Robinson*.

First, *Robinson* in fact affirmed that the search-incident-to-arrest doctrine is "based upon the need to disarm [the arrestee] and to discover evidence." 414 U.S. at 235. Minnesota denies this, arguing that searches of the person require no rationale beyond the arrest itself. Minn. Br. 9; see Pet. App. 12a. But this Court has rejected calls to adopt just such a rule. See *Riley* v. *California*, 134 S. Ct. 2473, 2496 (2014) (Alito, J., concurring in part and concurring in the judgment). Rather, courts must examine whether a particular

"category" of warrantless search would "untether the rule from the justifications underlying" the search-incident-to-arrest exception. *Id.* at 2485. Adhering to this test, the Court repeatedly has declined to extend *Robinson* to certain categories of searches. See, *e.g.*, *ibid.* (digital data on cell phones); *Arizona* v. *Gant*, 556 U.S. 332, 343 (2009) (vehicle searches); *Knowles* v. *Iowa*, 525 U.S. 113, 118-119 (1998) (searches after issuing traffic citations).[1]

Second, Minnesota's argument misunderstands *Robinson*'s use of the phrase "the person." 414 U.S. at 235. *Robinson* itself dealt only with a pat-down of an arrestee's clothing and a search of the cigarette package found in his coat pocket. *Id.* at 222-23. It is this sort of exterior search—a search for "evidence found on an arrestee's body"—that *Robinson* contemplated when stating that searches of "the person" are reasonable incident to arrest. Pet. App. 24a-26a (Page & Stras, JJ., dissenting). And it is this understanding of the phrase "the person" that the Court has conveyed in all its search-incident-to-arrest decisions. See, *e.g.*, *Chimel* v. *California*, 395 U.S. 752, 763 (1969) (discussing the seizure of "evidence on the arrestee's person in

---

[1] We do not contend, as Minnesota would have it, that "this Court effectively overruled *Robinson* in" *Gant* and *Riley*. Minn. Br. 10. The three decisions are all of a piece. *Robinson* requires that courts examine whether an entire *category* of search generally is supported by the purposes behind the search-incident-to-arrest exception, rather than conducting a case-by-case inquiry. *Robinson*, 414 U.S. at 235; see *Riley*, 134 S. Ct. at 2485. Thus, when this Court described the *Robinson* rule as applying "categorically," it did so to contrast *Robinson* with the "case-specific" reasonableness inquiry required by the exigent circumstances exception. *Missouri* v. *McNeely*, 133 S. Ct. 1552, 1559 n.3 (2013). *Gant* and *Riley* confirmed this rule, and determined that certain categories of search are impermissible.

order to prevent its concealment or destruction"); *Preston* v. *United States*, 376 U.S. 364, 367 (1968) (stating that searches incident to arrest are justified "where the weapon or evidence is on the accused's person").[2]

The rule in *Robinson* does not apply, on the other hand, to chemical alcohol tests *inside* the body, which "implicate[] an individual's 'most personal and deep-rooted expectations of privacy.'" *McNeely*, 133 S. Ct. at 1558 (citation omitted). Both *Schmerber* v. *California*, 384 U.S. 757, 769-770 (1966), and *McNeely* confirm as much. See *Bernard* Opening Br. 18-20. *Robinson* does not authorize roving expeditions into a person's body.

Minnesota's entire response to these precedents is that *Schmerber* and *McNeely* "involved blood tests, not breath tests." Minn. Br. 12. Minnesota thus makes no attempt to reconcile these decisions with its reading of *Robinson*. And for good reason: it cannot. *Schmerber* squarely held that "the mere fact of a lawful arrest" does not justify warrantless searches "beyond the body's surface," because the "interests in human dignity and privacy which the Fourth Amendment protects" outweigh the government interests underlying the search-incident-to-arrest exception. 384 U.S. at 769-770. Under *Schmerber*, intrusions into the body cannot be justified as searches incident to arrest.

If *Robinson* had truly announced a "categorical right to search persons incident to lawful arrests"

---

[2] The Court did use the phrase "the person" in a general discussion involving buccal swabs. *Maryland* v. *King*, 133 S. Ct. 1958, 1970-1971 (2013). This discussion, however, came only after the Court determined that the searches at issue fell within the special needs exception to the warrant requirement, and that a warrant therefore was not required. *Id.* at 1969-1970.

(Minn. Br. 10)—and if that right extended to the interior of the body, as the court below held and as Minnesota maintains (Pet. App. 8a-9a, 13a; Minn. Br. 9-11)—*Robinson* would have read *Schmerber* off the books. Yet the Court in *Robinson* did not disapprove *Schmerber*'s search-incident-to-arrest holding, and the Court confirmed that holding in *McNeely*. 133 S. Ct. at 1558. This is because *Robinson* did not apply to searches "beyond the body's surface." *Schmerber*, 384 U.S. at 769. It authorized only certain searches outside of the body, and physical searches of objects found there.[3] Breathalyzer tests, which require insertion of a tube into the arrestee's mouth to retrieve deep-lung air (*Bernard* Opening Br. 24-25), lie beyond *Robinson*'s reach.

2. Chemical BAC tests do not implicate the Chimel *rationales.*

Minnesota also maintains that warrantless breath tests are constitutional because they "further the *Chimel* justification in preventing the destruction of evidence." Minn. Br. 11. As with Minnesota's view of *Robinson*, this argument is doubly wrong.

First, concerns about alcohol dissipation would apply equally to all chemical alcohol tests, including

---

[3] *Robinson* does not apply even to all exterior searches of the body. For instance, the Court has said that "the interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street" (*Illinois* v. *Lafayette*, 462 U.S. 640, 645 (1983)), and has declined to decide whether a strip search can be justified under the search-incident-to-arrest exception (*id.* at 646 n.2; see *Florence* v. *Bd. of Chosen Freeholders of Cty. of Burlington*, 132 S. Ct. 1510, 1522-1523 (2012)). If Minnesota's characterization of *Robinson* were correct, both a forced disrobing and a strip search would be per se justified as part of a "full search of [the] person." Minn. Br. 9.

blood tests. Yet *Schmerber* determined that blood tests could not be justified solely on the basis of an arrest, as fears about destruction of evidence "have little applicability with respect to searches involving intrusions beyond the body's surface." 384 U.S. at 769. *Schmerber* thus forecloses any reliance on the destruction-of-evidence rationale.

Second, even if *Schmerber* did not decide this issue, *McNeely* did. Minnesota states that "the alcohol level in a person's blood begins to dissipate" at a steady rate after it is absorbed into the body, such that "a significant delay in testing will negatively affect the probative value of the results." Minn. Br. 11-12 (quoting *McNeely*, 133 S. Ct. at 1560-1561). This is true, as far as it goes. But focusing on this pronouncement in *McNeely*, and not on what comes afterward, wholly misses the Court's point. In fact, the Court explicitly differentiated blood alcohol evidence from evidence over which arrestees have direct control:

> In contrast to, for example, circumstances in which the suspect has control over easily disposable evidence, * * * BAC evidence from a drunk-driving suspect naturally dissipates over time in a gradual and relatively predictable manner. Moreover, because a police officer must typically transport a drunk-driving suspect to a medical facility and obtain the assistance of someone with appropriate medical training before conducting a blood test, some delay between the time of the arrest or accident and the time of the test is inevitable regardless of whether police officers are required to obtain a warrant. * * * This reality undermines the force of the State's contention * * * that we should recognize a categorical excep-

> tion to the warrant requirement because BAC evidence "is actively being destroyed with every minute that passes."

McNeely, 133 S. Ct. at 1561 (citations omitted). Because there is nothing that arrestees can do to destroy BAC evidence—and because not even Minnesota argues that blood alcohol tests are needed to protect officer safety—the traditional *Chimel* rationales cannot justify chemical alcohol tests. See *Bernard* Opening Br. 20-21.

B. Warrantless breath tests may not be upheld on a theory of "general reasonableness."

Alternatively, Minnesota asserts that warrantless tests of deep-lung air—and, therefore, the State's compelled-search regime—may be approved on the theory that they are "reasonable" as a general matter. Minnesota Br. 13-24. For reasons addressed in our opening *Bernard* brief, this contention is insupportable.

As we showed there, Minnesota's invocation of a general-reasonableness standard cannot be reconciled with the central rationale underlying the warrant requirement. It is settled that warrantless searches in criminal cases are *presumptively* unreasonable and unconstitutional. See *Bernard* Opening Br. 12-13; *Riley*, 134 S. Ct. at 2482 (The Court's decisions consistently "have determined that '[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, * * * *reasonableness generally requires the obtaining of a judicial warrant.*'" (emphasis added)). The Court has made clear time and again that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amend-

ment." *Arizona* v. *Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz* v. *United States*, 389 U.S. 347, 357 (1967)). This fundamental rule is "subject only to a few specifically established and well-delineated exceptions" (*ibid.*)—none of which Minnesota is able to invoke here. It therefore is unsurprising that the particular rationales advanced by Minnesota in support of its reasonableness argument are unavailing.

1. Minnesota begins by reciting the significant state interest in combating impaired driving. Minnesota Br. 14-16. But as we showed in our opening *Birchfield* brief (at 18-19), the Court rejected precisely this justification for a "general reasonableness" exception to the warrant requirement in *McNeely*. In fact, the government interest invoked by Minnesota here is no different in character from that posed by *any* serious criminal offense. Yet no one would suggest that the significant public interest in responding to, for example, life-threatening narcotics offenses or those touching on national security justifies dispensing with the warrant requirement in those cases.

The State also notes that BAC tests will be administered only when there is probable cause to believe that the subject has been driving while impaired. Minn. Br. 19. But that argument, too, was expressly rejected in *McNeely* as a reason for dispensing with the warrant requirement. See *Birchfield* Opening Br. 19. Indeed, if the existence of probable cause to arrest were sufficient to overcome the expectation of privacy that supports the warrant requirement, there would have been no need to recognize the search-incident-to-arrest exception to the requirement in the first place; *all* searches would be permissible following arrest. That, of course, is not the law.

2. In addition, Minnesota—on this point, supported by the United States—contends that breath tests, unlike blood tests, categorically may be conducted without a warrant. But the arguments advanced in support of this argument are insubstantial.

First, the United States points, "[o]n the public side," to the interest in "quickly and accurately identifying drunk drivers," as well as to the fact that conducting a breath test on the spot might make unnecessary a more intrusive arrest. U.S. Br. 33-34; see Minn. Br. 22. But that is hardly a reason to dispense with the warrant requirement: precisely the same points could be made in most cases where a suspect is arrested on suspicion of having just committed a crime and might, for example, be in possession of contraband. Moreover, "[t]he fact that an arrestee has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely. Not every search 'is acceptable solely because a person is in custody.'" *Riley*, 134 S. Ct. at 2488.

Indeed, the Court has often differentiated between the diminished privacy interests that exist after booking or charging a suspect, and the greater privacy rights of "an arrestee whose detention has not yet been reviewed by a magistrate or other judicial officer." *Florence*, 132 S. Ct. at 1523; *King*, 133 S. Ct. at 1971; *Bell* v. *Wolfish*, 441 U.S. 520, 544-548 (1979). Until a neutral magistrate has evaluated either the probable cause to arrest or the validity of an arrestee's detention, the constitutional justifications that allow at least some warrantless invasive searches do not apply. Petitioner never had this opportunity for review before police officers demanded to conduct a breath test. Pet. App. 3a-4a.

Second, the United States points to what it describes as the minimal intrusion of a breath test that is directed at obtaining deep-lung air. U.S. Br. 34; see Minn. Br. 19-21. Yet neither the United States nor Minnesota is able to point to a single decision in which the Court has authorized a warrantless search *inside* the body as part of a routine criminal investigation where a showing of probable cause was required. "The reason is that no such case exists." Pet. App. 28a (Page & Stras, JJ., dissenting). Breath tests require the insertion of a mouthpiece into the arrestee's mouth, after which the arrestee must blow into the mouthpiece him- or herself. Minn. Br. 20. The breath test lasts "anywhere from four to fifteen seconds" (*ibid.*)—around the same amount of time as a blood draw (see, *e.g.*, *People* v. *Esayian*, 112 Cal. App. 4th 1031, 1035 (Cal. Ct. App. 2003)). It strains both credulity and the English language to suggest, as does the United States, that such a breath test, although qualifying as a Fourth Amendment "search," poses only de minimis privacy concerns "and [is] not invasive of the body." U.S. Br. 34.

Third, the remaining contentions offered by the United States and Minnesota are makeweights. The United States observes that "[a]ll 50 States provide for warrantless breath tests under their implied-consent provisions." U.S. Br. 35. But this statement presumably is a reference to laws that suspend licenses as a penalty for test refusal, which are hardly equivalent to a "warrantless breath test" demanded in the course of a criminal investigation. These provisions also apply

equally to blood and urine tests, which all agree ordinarily *are* subject to a warrant requirement.[4]

The United States also contends that a warrant in the breath-test context "would fail to serve an important traditional function of warrants" because, even if a warrant is obtained, a breath test cannot be performed on a nonconsenting individual. U.S. Br. 35. But in fact, as we show in the *Birchfield* reply (at 17-19), warrants often induce suspects to cooperate with a search. And in any event, the speculative possibility that the recipient might not respond to a warrant is hardly a reason to allow officers in the field to ignore the warrant requirement altogether.

Finally, Minnesota does not advance its position by asserting that a warrant is unnecessary because a neutral magistrate ultimately will make a probable cause determination prior to the imposition of a criminal penalty. Minn. Br. 23. The point of the warrant requirement is to assure that the "inferences to support a search" are drawn by a neutral magistrate. *Riley*, 134 S. Ct. at 2482. It would seem obvious that this purpose will be frustrated if the magistrate is not consulted until *after* the search takes place.

Of course, warrantless chemical alcohol tests may be constitutional in some circumstances. If a true "now or never situation" is present, officers may justify a

---

[4] We noted in the opening *Bernard* brief (at 25-26) that the generally equivalent treatment of nonconsensual blood and breath tests by the States suggests that the privacy interests at stake in the two sorts of test are equivalent. The United States responds that forcible testing is not at issue here. But that is a non sequitur; our point is that States have placed significant and equivalent restrictions on the two forms of test, which indicates that the States have recognized both to "implicate a significant privacy interest." *McNeely*, 133 S. Ct. at 1567.

breath or blood test under the exigent circumstances exception to the warrant requirement. *McNeely*, 133 S. Ct. at 1563; see *Riley*, 134 S. Ct. at 2487. But the blunderbuss rejection of the warrant requirement proposed by the United States and Minnesota cannot be reconciled with either the policy of the Fourth Amendment or this Court's precedents: "[w]hether a warrantless [chemical] test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." *McNeely*, 133 S. Ct. at 1563.

CONCLUSION

The decision of the Minnesota Supreme Court should be reversed.

Respectfully submitted.

JEFFREY S. SHERIDAN
Sheridan & Dulas, P.A.
320 Eagandale Center
1380 Corporate Center Curve
Eagan, MN 55121
(651) 686-8800

EUGENE R. FIDELL
Yale Law School
*Supreme Court Clinic**
127 Wall Street
New Haven, CT 06511
(203) 432-4992

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
MICHAEL B. KIMBERLY
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

APRIL 2016

---

* The representation of petitioner by a Clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.